UNITED STATES OF AMERICA
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ERVIN WALKER, et al.,)
)
Plaintiffs,)
)
vs.) No. 4:17-CV-1229 HEA
)
DIRECTORY DISTRIBUTING)
ASSOCIATES, INC., et al.,)
)
Defendants.)

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE HENRY A. AUTREY
UNITED STATES DISTRICT JUDGE

January 16, 2019

APPEARANCES:

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(The following proceedings were held in open court on January 16, 2019 at 11:04 a.m.:)

THE COURT: Good morning all. This is the matter of Directory Distributing Associates, Inc., Debtor, Ervin Walker, Donald Walker, Eric Allen, Justin Cooper, Regina Coutee, and Brian Mathis, Plaintiffs, and Directory Distributing Associates, Inc., Richard Price, Steve Washington, Laura Washington --

(Lights went out.)

THE COURT: -- Roland E. Schmidt, Sandy Sanders, and AT&T Corporation.

Maybe the government didn't pay the bill.

MR. WARFIELD: We were all thinking that, Judge. I'm glad you said that.

(There was a brief recess.)

THE COURT: So for counsel, Ms. Totten and Mr. Levinson, I guess I probably didn't know that you had fallen off. And while you were off I had finished the style of the case. With Laura Washington Roland Schmidt, Sandy Sanders, AT&T Corporation, and all embodied in Civil Case No. 4:17-CV-01229.

The matter is now before the Court for purposes of proceeding on a hearing with reference to a Motion to Withdraw Reference. All parties have had the opportunity to respond and/or reply and file their memoranda in support of

their respective positions.

The parties are present through counsel. Some counsel are present in open court, other counsel are present by phone. I believe Ms. Totten, Julie Totten, is present by phone. Is that correct?

MS. TOTTEN: Yes, Your Honor, I am here.

THE COURT: And, Mr. Levinson, Marc with a C, Levinson is also present by phone, correct?

MR. LEVINSON: Yes, Your Honor. Thank you.

THE COURT: All right. And all other counsel are present in open court. Is everybody ready to proceed?

MR. MITHOFF: We are, Your Honor.

THE COURT: All right. Let us proceed.

MR. POST: Good morning, Your Honor. My name is Russell Post. I am a member of the plaintiffs' counsel team. Our lead counsel, Richard Mithoff, is with me as well as Bonnie Clair, our bankruptcy counsel.

Because there's some discussion in the papers about the passage of time in the case and proceedings in the bankruptcy and, in fact, some implication that the plaintiffs have delayed proceedings, I think it may be useful for us to begin by reminding the Court how we get here. Because the plaintiffs have been trying to move forward in good faith on this Motion to Withdraw Reference for the two years since this bankruptcy was filed. And we think today is the day

that that issue is ripe for a decision.

If I can take a couple of minutes to remind the Court of the history of the case because I know you've seen us only once before.

THE COURT: Please.

MR. POST: This is a Fair Labor Standards Act collective action case. It was originally filed in Texas state court in 2011. And there was a conditional certification order. Approximately 19,000 workers nationwide opted into the litigation. Directory Distributing Associates, the defendant now who is represented by the trustee for the estate of DDA, was a company that hired delivery workers to deliver telephone books under form contracts that classified them as independent contractors. And the plaintiffs have alleged that they were misclassified, and that, in fact, they were employees subject to the Fair Labor Standards Act.

DDA contracted with AT&T and various AT&T entities for the delivery of AT&T telephone books, and because of the degree of control that AT&T exercised in that relationship, the plaintiffs have alleged that AT&T was the joint employer of the plaintiffs and was, therefore, likewise liable under the FLSA. And so that explains why you have DDA and AT&T as the defendants.

Now, after the conditional certification order you

had a nationwide collective action pending in Texas state court. And all of the out-of-state plaintiffs were dismissed from the case pursuant to a Texas venue statute that did not permit the out-of-state plaintiffs to proceed in the litigation.

That question was litigated through the Texas appellate courts, and ultimately that decision was upheld. And so what was left in the *Walker* case, the case now before you, were the claims of the Texas plaintiffs who had opted into the *Walker* case.

After that appeal was concluded, the plaintiffs filed a new action in the Northern District of California, that is the *Krawczyk* action. And that action was filed on behalf of all of those workers from all states other than Texas who had elected to participate in *Walker*, but who had been dismissed subject to established tolling principles. And it also alleged claims for a subsequent three-year class period, because with the passage of time, there was now a new period of claims for which liability was actionable. So the *Krawczyk* case, currently in the Northern District of California, includes the claims of the plaintiffs from the other 49 states and claimants for this second class period.

The case before you, the *Walker* case, includes only the Texas claimants who were ultimately remaining in the litigation and were eventually transferred here.

What happened after the end of the appeal is that the Texas trial court set an accelerated scheduled to push this case toward trial with a trial date of July 2017. And we were moving forward with the discovery in preparation for that trial date, and likewise we were moving forward with the preliminary steps in the *Krawczyk* action. Judge Chhabria in *Krawczyk* was pressing that case very actively. And we had gone through preliminary briefing motions and had dealt with Rule 12 motions, and we had a schedule to move forward toward conditional certification, summary judgment, decertification, et cetera.

At that point in October 2016, DDA filed for bankruptcy here in St. Louis in its home forum. And after some litigation over the question, a stay was imposed over the two adversary actions against DDA, and the stay was extended to AT&T.

The Motion to Withdraw the Reference that the plaintiffs are here on today was filed in the Southern District of Texas when the bankruptcy was originally filed seeking to withdraw the reference from the bankruptcy court. But simultaneously there were competing transfer motions that were brought before the court. The defendants urged that the *Walker* case be transferred here to St. Louis because of the pendency of the bankruptcy proceeding. The plaintiffs urged that it be transferred to the Northern District of California

to be consolidated with the *Krawczyk* case.

Ultimately the judge in Houston did not act on the Motion to Withdraw Reference, sent the *Walker* case to Your Honor for further handling. And so there was never any resolution of the question about the Motion to Withdraw the Reference.

And you may recall that we were before you I think last spring, if I recall correctly, it may even have been a bit longer, when we raised this issue and the parties were ready to proceed on it, but we all recognized that there was a pending transfer motion that had been filed in the *Krawczyk* action. And the defendants took the position that that should be resolved so you would know exactly what the nature of the case was. And candidly the plaintiffs agreed that that made sense, and so we told you there was no need at that time for you to engage on the issue.

So there was, in fact, litigation over the transfer question, and Judge Chhabria denied the motion to transfer *Krawczyk*. And he denied it with a ruling that recognized the plaintiffs' position that not only did he have a majority of the potential claimants in his case, but he had already made some progress on mastering the substantive issues in the case. And our position was that we would ask you to withdraw the reference and would then urge you, having withdrawn the reference, to send the adversary action to Judge Chhabria.

And he made a ruling that said there are plausible arguments for the plaintiffs to present to the courts in St. Louis that the case should be transferred to the Northern District of California, and so I'm not going to transfer the *Krawczyk* case at this time, I'll wait to see the developments that come from Judge Autrey or the bankruptcy judge.

At that point the trustee asked the parties to stand down in litigation in an effort to try and resolve the case through mediation. And so the reason that there's been a substantial passage of time is that the parties were collaborating toward a multi-party mediation that involved multiple mediators. The parties worked together in that respect. It took quite a while to coordinate schedules, principally the schedules of the mediators. And we agreed and there was, in fact, ultimately an agreed order memorializing the parties' agreement that there would be no further litigation prosecuted until the mediation was concluded.

The mediation took place in August of this year, and the parties were engaged in mediation discussions for two days, but it was unsuccessful. And so at that point we indicated that it would be our intention to move forward with the Motion to Withdraw the Reference and our position regarding transfer of the adversary litigation.

There was discussion between the lawyers about our

preparation for coming back before the court to withdraw the reference. There was I know some dialogue among the lawyers about trying to get that scheduled.

Meanwhile the trustee, as the trustee had every right to do, moved forward with developing his own plan of action to propose a liquidation plan. The plaintiffs were not involved in those discussions; we had no input. We candidly did not even know it was happening. And so before we could get a hearing on the Motion to Withdraw Reference, the trustee filed a proposed liquidation plan in the bankruptcy court and began taking steps to move forward on that plan. And we'll discuss that to some extent today.

My point principally to you is that we have not been seeking in any way to delay this matter. We have maintained all along that the Motion to Withdraw Reference is the first question that has to be decided. And as I'll argue in a moment on the merits, any suggestion that that plan has developed momentum that should preclude you from acting today I think is legally misguided and I think unfairly allows the trustee to put the cart before the horse.

The question before you today is whether the reference should be withdrawn. We will respectfully suggest must be withdrawn under the bankruptcy statute. And if the reference must be withdrawn, the whole exercise that the trustee proposes with his liquidation plan is lawless, can

never be confirmed, will be a waste of time and capital that needs to be spent more prudently on getting these cases to a resolution.

The question is ripe for a decision today. The plaintiffs have been waiting for two years to get a ruling on the Motion to Withdraw Reference. And although I recognize that the trustee now suggests he would like you to defer that ruling again, and AT&T enjoins them, that is only deferring the inevitable. The issue is not going to go away, and we need a decision on it today so we can get this case to a resolution in a legally proper and efficient way, not in a way that's going to end in what we expect to be a dead end that wastes time and capital for everyone.

With that overview let me turn to the grounds for withdrawal of the reference. The motion puts forth both permissive and mandatory grounds for withdrawal. I want to focus the legal argument on the mandatory withdrawal of the reference because I see no principled legal argument. And, in fact, to his credit the trustee has not even attempted to make a legal argument against withdrawal of the reference. The test for withdrawal is that if a case requires consideration of federal laws other than bankruptcy laws, withdrawal is mandatory, not discretionary.

And the test that the federal courts have developed to apply that mandatory standard over the years is that a

case that presents a substantial and material question of federal law triggers the mandatory withdrawal of the reference requirement.

Courts have not enforced that language so strictly as to say any consideration of any non-bankruptcy law requires withdrawal, I candidly think there's an open question whether the Supreme Court would insist on a literal interpretation of the statute if the question came before it, but even under the test that the courts have applied, that a substantial material question of federal law is necessary, this case easily meets that standard.

This case involves purely claims for damages under the Fair Labor Standards Act. It has no bankruptcy connection whatsoever except for the fact that the Defendant DDA is now a debtor in bankruptcy.

The original briefing before the Court when the motion was originally filed pointed out there are a number of complicated matters of liability under the FLSA that will have to be adjudicated in the case. The question of misclassification, the question of joint employer status, questions regarding remedies. The defendants took the position that none of those was a substantial and material question of federal law as to which there was any difficult issue to be resolved. We disagree. I think that on that standard alone it was obvious that withdrawal was going to be

mandatory.

But the course of the litigation has revealed two questions about remedies that are unique to the Fair Labor Standards Act as to which there is a significant disagreement between the parties and, candidly, it's all that stands between these parties in my view at this point is coming to a resolution about the remedies available to the class members.

And there are two issues that I'll call to your attention. The first issue is whether the FLSA allows what is known as an overtime gap time claim. This is a claim for recovery of damages for hours less than the overtime threshold of 40 hours a week but greater than the amount of time for which the plaintiffs were, in fact, paid by the defendants. The plaintiffs' position is that we are entitled to those damages. The defendants' position is that we are not entitled to those damages.

The plaintiffs' position rests on a Department of Labor bulletin, 29 CFR Section 778.315. The defendants are citing legal authorities that they say disregard that bulletin. There is candidly a division in authority among the courts about whether to defer to that bulletin. That is a significant legal dispute, solely a question of FLSA law that only a district court can resolve.

The second issue that bears on the remedies is whether calculation of the plaintiffs' regular rate of pay,

which is the key variable for determining overtime compensation in an FLSA case, requires the Court to look at the total number of hours that the plaintiffs worked or only the hours for which they were directly compensated by the defendant when you do the math to determine the regular rate of pay. So in an FLSA case you look at what the compensation was that was actually paid to the plaintiffs, and then you do a calculation that takes into account the hours that were worked and the hours that were intended to be compensated under the agreement between the parties.

The defendants' position is that in order to determine that regular rate, and you can easily see the regular rate dictates what the overtime rate is going to be at time and a half, to determine that regular rate you have to divide compensation by the total number of hours worked including hours that were not reported and for which the plaintiffs were not actually compensated.

The plaintiffs' position is that in order to determine the regular rate you divide the compensation by the hours that they were directed to report to their employer, and you do not dilute the regular rate by accounting for the unreported hours for which they were not paid in violation of the FLSA.

There is a dispute between the parties about whether that calculation is correct. The plaintiffs stand on 29 CFR

Section 778.318(b). And there is a disagreement between these parties about how you make that regular rate calculation.

Those two hotly contested questions of federal labor law are the critical questions that are going to need to be decided to determine the remedies in this case. Those are questions that only an Article III court can decide. They are substantial and material questions that must be resolved in order for this case to be resolved. And under the language of 28 U.S.C. 157(d), that makes withdrawal of the reference mandatory. So I'm not even going to talk about the permissive withdrawal criteria because it's not necessary for the Court even to reach it.

I do want to speak to the response that you have received from the trustee so I can offer the plaintiffs' perspective on the trustee's position. The trustee, of course, did not even respond to this motion for two years. And even today he claims he doesn't take a position on the motion. I will suggest to the Court that's because the trustee's counsel, who is an accomplished bankruptcy attorney who we have great respect for, recognizes that at the end of the day to adjudicate these FLSA claims, withdrawal of the reference is inescapable as a legal conclusion.

The trustee's position is that you should yet again defer ruling on the issue in order to avoid the question

because he believes he can go forward with a liquidation plan that will somehow estimate these claims that a bankruptcy court cannot adjudicate and lead to a liquidation plan that will assign value to the plaintiffs' claims without any Article III court ever passing on them. And we respectfully submit that's squarely in the face of the restrictions on bankruptcy court jurisdiction, that in a non-core proceeding such as this one that is going to involve disputed questions that require trial by jury under the Seventh Amendment, the trustee cannot proceed as he has suggested.

And I think that this is very much the lesson of *Stern v. Marshall* when the Supreme Court emphasized questions that require adjudication of traditional damage claims are classically the questions that are assigned to the federal judiciary, and Article III requires that they be adjudicated by a federal district court. They cannot be delegated to the bankruptcy court. But that is the proposal that the trustee is asking the Court to endorse. Sooner or later this question will have to be resolved. If it's resolved today, we avoid a waste of resources pursuing a plan that could never legally be defended. Otherwise we kick the can down the road, we spend more time and more capital on litigating over a bankruptcy plan that can never survive, and then we come back to you and we have to have the same debate again.

The plaintiffs have a path forward. It's the path

forward that we've suggested from the very beginning. We do not want to delay the resolution of this case, on the contrary we want to move it expeditiously forward. And here is the path that we propose:

No. 1, the Court withdraws the reference, so it's clear to all that these FLSA claims have to be adjudicated by an Article III court.

No. 2, we suggest that *Walker* be transferred to the Northern District of California where Judge Chhabria has the claimants from the other 49 states and the second class period and has already spent time investing in the merits of the case. But obviously if Your Honor thinks it's better that you retain jurisdiction over the *Walker* case, we're certainly happy to proceed here as well. But either way it has to be adjudicated in an Article III court.

No. 3, once that determination is made as to where the case proceeds, we adjudicate the FLSA claims properly in a court with jurisdiction to decide them, and then once the value of that claim is liquidated and determined, that claim becomes a claim to be submitted as part of the bankruptcy plan that can be appropriately confirmed.

To the extent the plaintiffs prevail on their theory and we establish that we have damages in the range that we believe we have, which is candidly substantially in excess of the bankruptcy estate, there are avoidance claims for

avoidable transfers that the trustee has reserved that would be ripe to be litigated. There is more than $10 million of avoidable transfer claims that we believe are properly considered to be assets of the estate.

The trustee's liquidation plan only gets a small fraction of value for those claims, but that's because it's putting the cart before the horse. If you adjudicate the FLSA claims, then you know the value of the liability and then those transfer claims can be litigated.

Now, let me talk to you a minute about what's going on in the bankruptcy itself. There are no meaningful creditors of DDA except the FLSA class and AT&T, which has asserted a disputed indemnity claim against DDA. The other creditors are pennies on the dollar for this estate.

So our suggestion that we adjudicate the FLSA claim correctly in an Article III court does no harm to anyone else. The bankruptcy proceeding can simply be abated as it was for the better part of the last year while we pursued the mediation. We resolve the value of the FLSA claims and then we go back to the bankruptcy proceeding.

And so that then leaves you with the question, what is the value of the liquidation plan that the trustee is asking you to prefer rather than withdrawing the reference and litigating the claims.

There are four serious defects with the trustee's

proposal to hide from the Motion to Withdraw a Reference and move forward with the plan. No. 1, as I've said, it would deprive these plaintiffs of their right to an Article III court and a jury under the Seventh Amendment to adjudicate their claims.

That is a fatal defect that will make the estimation procedure impossible to confer. And I would point the Court just in the spirit of a couple of authorities to the *In re National Gypsum* case which is cited in the papers. That's a case in which the federal court recognized that because there were damage claims arising under federal statutes, withdrawal of the reference was mandatory. And also the *In re Ozier* case, which is cited in the papers in which the federal district court recognized that you cannot adjudicate a non-core claim that will require trial by jury under the Seventh Amendment in a bankruptcy proceeding because it would violate the reexamination clause. And, therefore, any suggestion that you go forward with this plan is legally misguided.

But there are practical problems as well. The first is that it would make the class ultimately accept the trustee's unilateral determination of the value of the claim. He's assessed a value of $4.9 million for this claim as a whole. And his proposal to the bankruptcy court is that we will just have to accept that value that he's unilaterally

determined subject to his estimation proceeding in which we will have some opportunity to contest that value. But we've had no input on that claim. That valuation substantially understates the plaintiffs' valuation of the claim, which as I've explained turns on the resolution in large part of these open questions of FLSA remedies law.

No. 2, his plan would allow DDA's owners, the Runk family, to retain the majority of the more than $10 million that they fraudulently took out of the bankruptcy estate as opposed to adjudicating the claim and knowing exactly how much of that avoidable transfer should be on the table in the bankruptcy.

No. 3, in a step that I consider truly extraordinary, the plan proposes to give a release to AT&T, a non-debtor defendant of the claims asserted by the plaintiffs' creditors of the bankruptcy estate for $250,000 of value to the class. It's inconceivable that a bankruptcy court can order a release of a non-debtor of viable claims entitled to adjudication in an Article III court with a jury trial under the Seventh Amendment, but that's what the trustee's proposal suggests.

He will argue that you should stand down because the plan is already moving forward and there is some reliance interest in moving forward with this procedure. I suggest that there is neither substantial nor justifiable reliance

here.

First, this reliance cannot be justified. Reliance on a liquidation plan that as I've explained is lawless and could not be confirmed and violates Article III could never be a basis for the Court to defer to this process that was set in motion.

But, second, the reliance is not substantial. As I said, it only was initiated just before Thanksgiving when the trustee filed his liquidation plan. I won't suggest that it was in order to get ahead of the plaintiffs on the Motion to Withdraw the Reference, but I will suggest that the trustee knew we were coming back to you for a ruling on the Motion to Withdraw the Reference.

All that has happened to this point is the bankruptcy court has approved certain notice procedures to allow notice to be sent to potential claimants that this bankruptcy process is beginning. There is a hearing set for February 7th to hear objections to this proceeding. And so if the Court stops this exercise in its tracks today by withdrawing the reference, there is no substantial reliance that we'll be defeated and you will put the case back on track to an orderly and legal resolution.

And so I would urge the Court, do not defer to a liquidation plan that was designed to divest the Court of its Article III authority and would deprive us of the right to a

decision on these claims by an Article III judge and by a jury.

If the Court has any questions I'm happy to address them, otherwise I will defer to counsel. Thank you, Your Honor.

THE COURT: Thank you. Response.

MR. LEVINSON: This is Marc Levinson, and I guess I could go now in opposition to the motion or the trustee could go. Does counsel for the trustee or the Court have a preference?

THE COURT: Does the trustee have a preference?

MR. WARFIELD: I don't have a preference, Judge, we could do it either way.

MR. LEVINSON: Well, fine, I'll go. But first thank you for permitting --

MR. WARFIELD: Marc, why don't I go? I think the Judge would prefer if the trustee goes first.

MR. LEVINSON: Oh, that's fine, Your Honor. Thank you.

THE COURT: Thank you.

MR. WARFIELD: Your Honor, for the record David Warfield on behalf of John Vaclavek, who is the Chapter 11 trustee. He was appointed in February of 2017, so a lot of this history that Mr. Post went through occurred prior to the trustee's tenure.

But Mr. Post is correct, we do -- in one respect. We do believe that this Court should defer ruling on the Motion to Withdrawal Reference, in large part because of the events occurring in the bankruptcy court, and they are occurring in very short order.

The trustee filed the Chapter 11 plan in November. The plan says that all the FLSA claimants will be paid the full amount of the claims as estimated by the bankruptcy court to be confirmed by the bankruptcy -- or as estimated by the bankruptcy trustee to be confirmed by the Court.

The payments would be made under the bankruptcy plan, both the *Walker* plaintiffs and the *Krawczyk* plaintiffs. The payments would be made regardless of whether the individual claimants opted in or not. But the plaintiffs have objected.

The trustee filed the plan and the related pleadings on November 19. The plaintiffs objected immediately. We had two contested hearings in the bankruptcy court. The plaintiffs didn't even want the claimants to know that the trustee had made a proposal that would pay them. At the two contested hearings -- after the two contested hearings the bankruptcy judge decided that the plan process can go forward, that there will be a hearing, really the first substantive step on confirmation of the plan, on February 7.

And we think that should play itself out candidly.

And that's a much more comprehensive solution to this issue that the trustee faces, is both really a litigant and an administrator here if you think about it, trying to solve the problems of all the claimants that have been asserted against -- all the claims that have been asserted against the estate.

In reliance on the bankruptcy judge's order notices have been sent to over 40,000 potential claimants. A website has been developed. Pleadings have been uploaded. That website is getting a great deal of use because it does provide for some feedback from the claimants. And they have been filing their responses to the various pleadings in the bankruptcy court. I know we got about 15 of them yesterday. And there have been a few dozen that have been filed today. So that process is very much underway.

Now, a brief summary of the plan, if I can fill in some of the gaps in what Mr. Post described. The trustee developed this plan sort of from the number and worked backwards. The trustee has at his disposal a list of all of the workers who delivered telephone books and who fit into the time frames of the relevant two FLSA claims. The trustee looked at that information. Working with consultants who are expert in calculating the time worked and the damages incurred with input from the lawyers, we came up with a number that we believe the claimants are entitled to that

gives them every benefit of the doubt on the applicable law and the facts. And, in fact, uses some off-the-clock calculations that the plaintiffs have mentioned in the course of various discussions.

This is the trustee's best estimate of what the claimants would receive if they prevailed on 100 percent of their arguments at trial. Now, we heard that there are two issues. That's probably the most fulsome description of the two issues I've yet heard from the plaintiffs. It may help in going back and evaluating our numbers. But this was the trustee's best faith, good faith estimate as to what these folks would be entitled to.

Then the trustee went to the two parties who are -- who could contribute to payment of those folks. Those two parties being AT&T, the codefendant, and the Runk family, the shareholders. Mr. Post is correct in saying there are transfers slightly in excess of $10 million that appear to be avoidable by the trustee.

And we said, will you cover, will you contribute to the plan an amount to pay the trustee's best estimate of what these folks would be due if the case went to trial? And after considerable discussion that frankly began on the second day of the mediation when it became clear in our interactions with the plaintiff that there wasn't going to be a settlement, we started even before we left the mediation

room trying to put together this plan.

And we ultimately reached the point where those two plan funders, if you will, agreed to contribute enough money to make a payment to the FLSA claimants of everything that the trustee believes that they are owed.

Now, under this FLSA statute counsel is also entitled to a statutory fee. So we included in the plan a payment of $1.5 million to FLSA counsel and reimbursement of actual expenses. We didn't think we had to put a cap on that because we didn't know what it would be, so that's an additional $400,000. So that's what the plan says.

By the way, we heard a lot about how we settled for just a fraction of what the Runks owed. As it works out, the Runks, the shareholders who received the transfers, are paying almost 50 percent of what we would recover from them without any resulting claim or any complications or any litigation or any threat of an adverse result. So it's not I think exactly accurate to say that we let them off with a nominal payment.

Now, the plan also does provide the third-party releases that Mr. Post mentioned. But he failed to inform the Court that in addition to the payment that AT&T is making to fund the plan, it is also going to waive a claim that it has told the trustee -- "waive" is the wrong word, I'll get back to that. Has agreed to subordinate its claim of $2.5

million effectively until all of the FLSA claimants are paid in full. It's not technically a waiver, but they've agree they are not going to get paid anything on their claim until every one of the FLSA claimants is paid in full.

So we heard about the estimation. And, Your Honor, I don't know how much you may have run across this previously, but there is a section of the bankruptcy code, it's Section 502(c)(1) of the bankruptcy code, that specifically says a bankruptcy court can estimate the amount of claims that are contingent or unliquidated if the fixing of those claims or setting of those claims would unduly delay the administration of the bankruptcy estate. This is a provision that was frequently used in bankruptcy when the court is faced with claims that would take a long time to ripen. Bankruptcy estates can't stay open forever. So you see this sort of provision used in many different contexts. For example, environmental claims where it may take forever or many decades even for the claim to actually finally be liquidated.

Now, "estimation" is the phrase the bankruptcy court uses, but for purposes of our case and generally speaking, it is the allowance of the claim at that amount.

Now, any suggestion that the plaintiffs would be deprived of any due process rights going forward just simply isn't true. The plan is on file. It's been on file now for

two or so months. The motion to estimate was filed in late November as well. It's been on file for a couple of months. The plaintiffs have had notice of the February 7 hearing now for some time. They can appear at that hearing, and I'm sure they will. And they will argue that the motion to estimate is not well taken, that the trustee has not satisfied the statutory burden of showing undue delay to administration of the estate, and/or they will argue -- clearly they will argue based on what they said this morning that these are claims that are not estimateable under federal law. They'll have that chance on February 7, three weeks or less from now.

Now, if they win that argument, we have said in papers both here and in the bankruptcy court that that will cause the trustee to withdraw the plan. The plan that is on file is based on the bankruptcy court exercising its authority to estimate the claims. So it's possible we could know as soon as February 7 that the plan isn't going forward. They'll have ample opportunity to object.

But the way we set up this motion, even if the plaintiffs don't prevail on February 7th, even if the bankruptcy court says, yes, I believe you have satisfied the statutory requirements for 502(c)(1) to estimate a claim and, yes, I don't see any exception for FLSA claims in the statute, there is no reason to believe that they alone among all the other claims that can be estimated can't be

estimated. If the trustee prevails on those issues, it still doesn't fix the amount of the claims. That will be determined at a subsequent hearing.

And obviously the plaintiffs will have a second bite at that apple to say, okay, Judge, we've lost on the issue of whether the claims can be estimated, but we think the trustee undershot the estimate. They'll have the ability to make that argument at a later date. We haven't fixed the hearing date with the bankruptcy judge yet, but I would offer that that will occur in the first half of 2019. I feel fairly comfortable with that. That's about the time frame that we were discussing generally with the bankruptcy judge at those contested hearings.

And then finally let's say that they even don't like the number that the judge estimates their claims at. They can still argue at that point that the plan doesn't meet the standards for confirmation of a bankruptcy plan under the bankruptcy code. So they will have at least three bites at the due process apple.

And all of this will occur on a time frame that seems positively speedy compared to the way the non-bankruptcy litigation has gone in these cases from the beginning, long before the bankruptcy case was even filed.

Now, Judge, a word or two about jury trials and bankruptcy because I think this notion that the plaintiffs

would have you believe that they can just because of the nature of their claims opt out of the bankruptcy case and not participate in it in liquidating the amounts of their claim is just wrong, and at best is very simplistic.

In a given year there are about a million bankruptcy cases filed in the United States up or down 10, 15 percent. And I would venture to say that every single one of those bankruptcy cases has a creditor who is entitled to a jury trial right. There's a breach of contract, there's a statutory claim that has a right to trial by jury. But those claims are dealt with in the bankruptcy cases every day in thousands and hundreds of thousands of cases over the course of a year.

And that's because notwithstanding what you were told this morning, the allowance or disallowance of claims against the bankruptcy estate is, in fact, a core proceeding. It is a core proceeding under Section 157(b)(2).

Now, as to the specific right to jury trials, here's what I can tell you. There's a statute on that. 28 U.S.C. Section 1411 says that a bankruptcy filing doesn't affect the right to a trial by jury, quote, with regard to a personal injury or for wrongful death tort claim, closed quote. Those are the two carve-outs. It doesn't say FLSA. It doesn't say any other federal statute. Personal injury and wrongful death claims, those are the claims in which there is

statutory authority that says no matter what else happens, that kind of creditor, that kind of claimant is entitled to a jury trial. There is no such protection, no matter how much the plaintiffs want to portray it that way, for a jury -- absolute jury trial right when they choose to assert a claim against the bankruptcy estate.

And by the way, I don't necessarily want to get into it, but there is a considerable body of law that says when a creditor participates in a fulsome way in a bankruptcy case regardless of whether they file a proof of claim or not, that they have waived their right to a trial by jury. And I think if we ever get to that point, that argument will be advanced by the trustee.

Also, Your Honor, I'd like to draw your attention to a case decided in this district on this very issue of mandatory withdrawal with a reference, which the plaintiff relies on this morning. In a case in the 1990s involving the *Interco* bankruptcy case, and Your Honor may remember that, that was a huge case. The old shoe companies and furniture companies, it was the largest case ever filed in this district for many, many years in a case called *Wittes v. Interco.* Judge Gunn -- well, the claim was a claim under the ADAA, a discrimination and employment act case. The claimant said, well, that's a special kind of claim, you have to withdraw the reference, the bankruptcy can't decide that

claim. And Judge Gunn said, nope, withdraw the reference doesn't apply to those kinds of claims. And automatically, I don't care if you have a jury right, and the bankruptcy court was able to adjudicate that claim. That case if Your Honor or your staff wants to look at is 137 BR 328. 137 BR 328, decided in 1992 by Judge Gunn.

So what would happen if the plaintiffs got what they want? What would happen as a practical matter if the reference was withdrawn? Well, there is an automatic stay in place against claims against DDA. That stay was not imposed after any litigation as counsel implied -- I think unintentionally applied. That stay is automatic. So the DDA stay is in place. The bankruptcy judge did extend the stay after some litigation to the codefendants, including AT&T. But regardless, if Your Honor withdrew the reference today, the automatic stay would still be in place.

So the plaintiffs would have to go back to the bankruptcy court, file a motion to -- for relief from the automatic stay, and the bankruptcy judge would have to decide that issue. Now, I think so long as the plan process is proceeding, and there is a resolution in the next few months in sight, I find it very difficult to believe that the bankruptcy judge would grant that relief. So withdrawal of the reference probably wouldn't as a practical matter accomplish a whole lot in this case.

And even if somehow they got relief from the stay, and counsel acknowledged this morning, their first act will not be to rev up the discovery, move toward a litigated resolution of this matter in *Walker*, but it instead would be to file a motion to transfer the venue to the Northern District of California. And that's despite the fact that this case was pending for five years, I believe, before the case in San Francisco was ever filed. And it's despite the fact that plaintiffs have already tried to transfer this case one time to the Northern District of California back when it was still in Texas and lost. So they are going to relitigate that issue instead of moving forward to a conclusion.

Now, Your Honor, just a couple responses directly to the four alleged serious defects in the trustee's plan.

No. 1, plaintiffs allege that it would deprive them of the right to have this matter litigated by an Article III court and a jury trial, and I think I've responded to that. The fact of the matter is parties who wish to assert a claim against the bankruptcy estate or to share in the race for the estate's assets have a choice, if they want to share in those assets, they have to deal with the bankruptcy court. If they -- if the plaintiffs here wanted to dismiss with prejudice the estate and pursue AT&T, it could do that and it would be free of the bankruptcy. Wouldn't necessarily solve my problem because I would still have AT&T's indemnity claim.

But the fact of the matter is they want their cake and eat it too. They want to share in that race of the bankruptcy estate, and with that choice comes consequences, including their, as they see, sacrosanct right to have the matter determined by an Article III judge.

They also said that all owners, the shareholders are paying only a fraction of what they took out of the company via fraudulent transfer. I will represent to the Court that they are paying between 40 and 50 percent on an absolute basis of what they -- the outside limit of their liability pursuant to this plan without any litigation.

By the way, another issue that's very important for me and my client as administrators of this estate is we have to bring that claim against the shareholders by December 31 of this year. The statute of limitations has actually already expired for us to bring that claim. In trying to move this forward to a consensual resolution, we persuaded the shareholders to give us a tolling agreement. I have no reason to believe that they would give us another tolling agreement. So that's another reason we need to go forward in the bankruptcy court and see if this will work.

It's clear that we won't be able to resolve this case, unshackle the plaintiffs, and go back to just litigating particularly since the first litigation will be where this case should pend.

And, finally, the other fatal defect in my notes is that we gave -- the plan gives a release to the non-debtor parties including the Runks, the shareholders, and AT&T. And in particular that AT&T is only contributing $250,000. I can represent to your court that the trustee took no role in the allocation of the payments between the Runks and AT&T. We told them how much money we needed, and they came up with how to divide it among themselves.

But be that as it may, in addition to payment of the $250,000, AT&T is, as I said before, subordinating effectively its indemnity claim, which would exist whether there is a judgment entered against AT&T or not because the indemnity purports to include attorneys' fees. So I have to deal with that claim. It may be objectionable, it may not be objectionable, but it's a claim that if there is no settlement we have to deal with. But this settlement under the plan deals with that. And the provision of third-party releases to parties who fund a plan is de rigueur, it's common. Strike that, let's use the word common.

And by an example I'll give a case that Your Honor, local case Your Honor may be familiar with because it got a fair amount of press coverage at the time, it was the *US Fidelis* case a few years ago where there was a fraud committed by the debtor in that case against several hundred thousand parties who purchased aftermarket warranties, and

vehicle service contracts to be precise. And various parties contributed to that plan that then paid out those folks, all of whom I'm sure had a jury trial right incidentally for fraud. And the plan gave a release to those parties who funded the plan and the payments. So there's nothing unusual to that -- about that. It is litigated in bankruptcy court. Cases are confirmed all the time that contain third-party releases. Sometimes they are not confirmed. But that's what we'll find out in the bankruptcy court.

So in summary, Judge, we've given a lot of thought to this, the trustee and I. We've put together a program that we think will get money in people's hands soon, within the next six months if we can go forward. Withdrawing the reference, opening the door to venue litigation, opening the door to motions for relief from stay would not be in our view consistent with this notion of seeing if the bankruptcy process can provide a solution for all the creditors in this case.

So, Your Honor, in summary we propose to file a pleading, I think I said before February 9th or 10th in our papers, to let Your Honor know what happens in bankruptcy court on the 7th. The judge may rule, the judge may take it under advisement. Either way we'll let you know. Your Honor, I'm sure, may want to schedule a status conference thereafter. We think that's fine. We can take stock where

we are then. I will tell you if we're -- if the judge has approved the motion, the first stage of the motion to estimate, has approved the disclosure statement, we're probably going to say please stand down, let the plan process play out. But we're happy to come back in a month or so after the bankruptcy court has had a chance to rule and take stock where we are then.

Thank you, Judge.

THE COURT: Thank you. Mr. Levinson.

MR. LEVINSON: Thank you, Your Honor. Mr. Post and Mr. Warfield have argued at length, so let me just hit a few high points, starting by saying that I support the trustee's position on the case.

Let's start with the facts as stated by Mr. Post, almost all of which were accurate and we endorse. We do disagree, though, with a couple things. First off, the *Walker* case was set for trial the following July, but the defendants had -- the defendant intended to file a motion to decertify the collective and was in the process of conducting discovery to do so, and then the bankruptcy interceded much to everyone's surprise while they were taking depositions in Houston. So that stopped, of course. And the motion to decertify was never filed. That would have delayed the trial no matter what.

If the Court were to withdraw the reference and

Judge Surratt-States were to grant relief from the automatic stay, that would proceed. So we're not talking about a quick trial in *Walker* in any event because it's just at the beginning stages.

Secondly, Judge Chhabria is not familiar with the case. When Mr. Post said he had mastered the facts, he's wrong. What's happened in that case was that AT&T, Inc. had filed a motion to dismiss as to it for lack of jurisdiction. Judge Chhabria had denied that motion and ordered discovery on that issue. He had also set an aggressive calendar, case management procedure, but no discovery has ever been taken in that case, not one deposition. Some written discovery has been taken but not one deposition has been taken. And of course as Mr. Post correctly said, no collective has been certified in that case. So that is years away from trial as well.

Let me turn to the core proceeding business. I am a bankruptcy lawyer and endorse what Mr. Warfield said about this being a court proceeding. 28 U.S.C. Section 157(b)(2)(A) provides the court proceedings include, quote, allowance or disallowance of claims against the estate. The only carve-out for that are claims for personal injury or wrongful death, which isn't the case here.

Let me talk about the Supreme Court decision in *Stern v. Marshall*, which was cited in the reply brief filed a

short time ago by the plaintiffs. *Stern v. Marshall* and *Executive Benefits Insurance v. Arkinson,* its two progeny, all dealt with claims by the estate against third parties, not their claims against the estate. The same is true for the *Granfinanciera* and *Langenkamp* Supreme Court cases where the question was, are you entitled to a jury trial when you are sued by the estate?

Once as Mr. Warfield pointed out you're seeking to collect from the estate, you're within the equitable power of the jurisdiction of the bankruptcy court. And as he said, lots of people with jury trial rights have jurisdictions in bankruptcy court and as these plaintiffs have as well.

It hasn't been mentioned so we will do so, that the burden of proof here is on the plaintiffs. And one of the elements of the mandatory withdrawal, which Mr. Post talked about, of course, was this business about a conflict between bankruptcy law and some other non-federal law. Today for the first time we heard about this dispute about remedies. I don't see how you could be sitting here listening, Your Honor, for the first time to references to the Code of Federal Regulations, cited no cases, and say that the plaintiffs who have had two years to work on this motion have carried the burden of proof to show that there is a substantial difference between the courts interpreting the FLSA.

The very case that plaintiffs cited in their reply brief for the first time and never before was this *Vicars Ins. Agency* case out of the Seventh Circuit. And the Seventh Circuit said among other things, "Given the discretion granted to district courts by Section 157(d) there is little reason to assume that withdrawals required by the mere presence of a non-title 11 issue, even if that issue is outcome determinative. This reading, which makes withdrawal virtually automatic, reads out of the statute both the district court and any 'consideration' whatsoever."

The fact is that a mere citing of a second federal statute beyond the bankruptcy code isn't enough. As Mr. Post said, it has to be substantial and material. And the burden of proof is to show that it is, and plaintiffs have utterly failed unless you consider that for the first time from the podium citing a dispute and citing some provisions of the Code of Federal Regulations carries that burden of proof, and we submit that it does not.

I want to address permissive withdrawal because Mr. Post didn't as well, so I'll leave it at that. Let me just take a look at my note real quickly. I think that's probably all I have to say in addition to what Mr. Warfield said, but give me just one moment.

THE COURT: Sure.

MR. LEVINSON: I'll just in a moment echo briefly

what Mr. Warfield said about estimation. The estimation statute, which is Bankruptcy Code Section 502(c)(1), says that estimation is mandatory, mandatory in the case of unliquidated continuing claims when the resolution would delay the administration of the estate. There is no carve-out for FLSA claims, of course, nor for anything else other than in Title 28, the reference that Mr. Warfield gave to personal injury and wrongful death claims, which is a federal statute that would trump 502(c)(1).

So the bankruptcy judge will decide that issue on February 7th. It will be fully briefed. Here you're just hearing bits and snatches from the argument about estimation, but as Mr. Warfield said, this estimation in common in bankruptcy cases, is a valuable tool in moving bankruptcy cases along as opposed to what could happen here if you withdraw the reference, Judge Surratt-States grants relief from the automatic stay, and we tumble into a year or two of litigation and then have to come back to the bankruptcy and deal with the AT&T indemnification claim and the claim against the former shareholders.

So with that, Your Honor, I'll let Mr. Post respond.

MR. POST: Very briefly, Your Honor. Thank you. The Court's been very patient and courteous with its time so I want to be very focused on the legal question that's before the Court, which is mandatory withdrawal of the reference. I

won't comment further on the merits of the plan or the bankruptcy proceedings.

The argument that you heard principally, though, from the trustee is that the trustee has a comprehensive and efficient solution to the case, and that economically it's going to be the best way to resolve what is otherwise a difficult problem. At its bottom that is exactly the argument that the Supreme Court rejected in *Stern v. Marshall*. The particular issue that arose in *Stern* that gave rise to a right to an Article III court was different than the nature of our claim. But the ultimate question was is it a sufficient answer to say we can ignore the constitutional limits on bankruptcy court jurisdiction because it would be efficient to move forward with a comprehensive bankruptcy solution? And the Supreme Court definitively said no. An estimation proceeding is a quasi administrative proceeding on an accelerated timetable in a front of a non-Article III judge is in no way a constitutional substitute for an Article III trial in front of a jury for which we have a Seventh Amendment right.

The argument was made that there is not a right to a jury trial in this situation. I submit there is no authority that will support that proposition. Obviously the Seventh Amendment right to a jury trial is much broader than the particular statute in bankruptcy that carves out specific

proceedings for which juries are mandatory. Any proceeding for which a litigant has a jury right under the Seventh Amendment precludes adjudication by a bankruptcy court. I think that proposition is well settled. I wouldn't expect that it would be subject to controversy.

So the estimation procedure that is put forward is not an answer to a jurisdictional defect. The question is not whether estimation is a good or a bad procedure, it's whether it is congruent with what Article III requires and the Seventh Amendment requires. And although counsel praised estimation proceedings and suggests that they are used widely, they have not cited any case in which an estimation proceeding has been used to estimate and ultimately confirm the value of a traditional damages claim for which adjudication is reserved to the Article III courts and a Seventh Amendment right to a jury trial. The only illustration you were given was environmental cases. Well, environmental cases arise under a distinct federal statute with a regulatory scheme that has a different history for which the right to jury trial is quite different. There is no authority that would support what they are proposing to do here.

Both counsel suggest that somehow this is a core proceeding and not a non-core proceeding, and that is an important distinction in understanding the force of the right

to a jury trial. This is not a core proceeding based on allowance of a claim. This is a non-core proceeding, an adversary proceeding against the debtor.

The test, and I'm reading, Your Honor, from *Securities Farms v. International Brotherhood of Teamsters,* which is 124 F.3d 997, it's a Ninth Circuit decision, the test is, "Actions that do not depend on bankruptcy laws for their existence and that could proceed in another court are considered 'non-core.'" That is the very essence of this case. It was proceeding in another court. This is a classic non-core proceeding. And so the Ninth Circuit went on to say, cases that did not depend on Title 11 but were in federal court only because of their potential impact on the administration of the estate are non-core, and because they are non-core, the right to de novo review of any decision in this court as an Article III court and right to a jury trial dictates withdrawal of the reference.

Now, counsel for the trustee alluded to the *Wittes* decision about mandatory withdrawal. I want to actually read from *Wittes* two key passages. What happened in *Wittes* is that the court there said there is no substantial and material question of federal law that needs to be decided, therefore, there is not a basis for mandatory withdrawal. But the test is exactly the test I gave you. The district court must make an affirmative determination that resolution

of the claims will require substantial and material consideration of non-code statutes. That's exactly the situation we have here. Withdrawal is mandated only where the issues presented require significant interpretation of federal law. As we've argued, these claims will require such significant interpretation.

And I note in Footnote 2 of *Wittes*, the district court makes a point of saying there may have been a right to a jury trial in this case but there was not a jury demand. In our case we have demanded and steadfastly asserted our right to a jury trial.

I don't think that there is any principle disagreement that there is a substantial material dispute between these parties about these difficult questions of FLSA liability. The suggestion has been made that this is the first that the defendants have heard of it. I will tell the Court we furnished legal memoranda to the defendants in advance of the filing of the liquidation plan that set forth our position on these issues. It was apparent at the mediation that these were the issues that were dividing the parties. So this is no surprise to anyone on the defense side of the case. This is the very heart of the litigation at this point.

And I heard counsel for AT&T say that that issue hadn't been developed in the original briefing, little

surprise because that briefing has been on file for two years. But you didn't hear him deny that there is a dispute. And you didn't hear the trustee deny that there is a dispute, because there is very serious dispute about these questions of federal law that remain unresolved.

The final point that I'll make is the practical one, that the trustee suggested even if you withdraw the reference, the stay will prevent any forward momentum in the cases. I don't think that that is a credible suggestion. The notion that the bankruptcy court would leave a stay in place after an Article III court withdraws the reference and preclude the parties from getting to a resolution on the value of the claims assumes that the bankruptcy court would actually choose to seek to obstruct a resolution of the case in a constitutionally appropriate way. That's not going to happen. If you withdraw the reference, the bankruptcy will grant relief from the stay. We will then adjudicate these claims in a proper way, and then we can have a proper and hopefully consensual plan that can be confirmed.

Your Honor, if you have no questions, we appreciate your time.

THE COURT: Thank you very much. I'm fine, Counsel. All right. Today is the 16th. Show the matter under submission. And, Counsel, between now and ten days from today, which would be the 26th, you'll get my ruling, okay.

Probably sooner than later. Yeah, sooner than later. Okay. All right. We'll be in recess.

MR. LEVINSON: Thank you, Your Honor.

THE COURT: Thank you, Mr. Levinson. Thank you, Ms. Totten.

MS. TOTTEN: Thank you, Your Honor.

(Court in recess at 12:21 p.m.)

C E R T I F I C A T E

I, Susan R. Moran, Registered Merit Reporter, in and for the United States District Court for the Eastern District of Missouri, do hereby certify that I was present at and reported in machine shorthand the proceedings in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of my stenographic notes.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys in this action, nor financially interested in the action.

I further certify that this transcript contains pages 1 - 48 and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

IN WITNESS WHEREOF, I have hereunto set my hand at St. Louis, Missouri, this 5th day of February, 2019.

_____

/s/ Susan R. Moran
Registered Merit Reporter